

A Constitutional Referendum to Delegitimize the Constitution

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The Polish President Andrzej Duda has just announced that on 10 and 11 November a referendum will be held in Poland on the need to amend the Constitution, in which he will put to the Polish people numerous questions arising from ongoing public consultations.

This consultative referendum is an attempt to delegitimise the Constitution, on which the referendum's own legitimacy is based (Article 125 states that a referendum can be held on matters "of particular importance to the state").

President Duda has been trying for some time to convince citizens that the current Constitution, which is barely 20 years old, is outdated. He has even advanced the bizarre argument that every generation should have its own constitution, and that young people such as his daughter (currently studying law) did not vote in the current one.

The President has a second, anti-elite argument: that the current method of constitutional amendment is undemocratic. According to Article 235 of the Constitution, amendments require a qualified majority in both houses of parliament; if an amendment concerns key chapters of the Constitution, a referendum is also required. President Duda argues that amendments are prepared by the elite, with their outcomes only presented to citizens for their approval. Therefore on this occasion, instead of amending the Constitution in the usual manner, the President has taken the road less travelled: a general consultative referendum under Article 125. Despite its "consultative" nature, the referendum will be binding if participation exceeds 50% of the electorate.

The President's consultations on the subject of amending the Constitution are no doubt motivated by the hope of a binding result despite his political camp's lack of a constitutional majority in parliament. Although ostensibly extensive, the Presidential consultations over the amendment are not entirely open: after all, he determines the participants and the agenda. For instance, the crucial issue for the President is whether Poles prefer the parliamentary-cabinet system of government or a presidential one. The President naturally supports a change towards the latter.

Another of the President's favour topics for discussion is the issue of primacy of the Polish Constitution over European law. Despite holding a PhD in law, the President seems to have forgotten that Article 8 of the Constitution clearly stipulates that the Constitution is the highest law in Poland and that the Polish Constitutional Tribunal has on several occasions proved this hierarchical advantage in assessing whether the European treaties comply with the Polish Constitution.

What is more, in the eyes of the President, not all constitutional topics are created equal: the presidential consultations show no willingness in to tackle subjects such as increasing the independence of the judiciary or amending the constitutional definition of marriage as a

union between a man and a woman, which for many is an obstacle to the legalization of same-sex marriage in Poland.

The procedure chosen by the President for the referendum is also questionable. To understand why this is so, consider if the President would agree to a consultative referendum on whether he should be brought before the State Tribunal, or on whether he is able to continue to discharge his duties?

His answers to such a request would likely be “No!”, mainly because affirmative answers to the two referendum questions (if the referendum were binding) would make it impossible for him to continue to discharge the duties of his office – at least for some time. The President’s legal advisers would doubtless respond that the Polish Constitution provides for special procedures for finding that the President is unable to discharge his duties. And they would be right: Article 131 states that the Constitutional Tribunal will, on the request of the Speaker of the Lower House of Parliament, determine whether or not there is any impediment to the President holding office, while permanent incapacity is determined by the National Assembly; Article 145 allows for bringing the President before the State Tribunal on the application of 140 members of the National Assembly with the votes of a two-third majority of the statutory number of members.

Thus, even the President’s legal advisors would argue that using a referendum to remove him from office would be circumvention of the Constitution. In this I fully agree with them. Why then is the Polish President proposing a consultative referendum that could lead to the current Constitution being questioned, if that same Constitution provides for a special amendment procedure? The terms of that procedure are laid out in Article 235: the National Assembly adopts amendments to the constitution, and in some cases an amendment is then put to an approving (not consultative) referendum. Thus, as would be the case with questioning the current President’s right to hold office, using a consultative referendum to amend the Constitution is circumvention of that very Constitution, not to say an abuse.

If a referendum to remove the President from office is constitutionally pointless, then the referendum to be held on 10 and 11 November is equally pointless. The Constitution is a rationally functioning whole and if it provides a specific procedure for any measure, this procedure should be applied. To do otherwise is to engage in an inadmissible circumvention of the Constitution, and a *reductio ad absurdum* of matters of State.

One can certainly proclaim that the issue of whether the President is able to hold office and whether he should stand before the State Tribunal are matters “of particular importance to the State” and thus matters for which Article 125 of the Constitution allows a consultative referendum to be held. If one takes that path, the arguments presented by the President to justify a referendum on the Constitution could be used to justify a referendum removing him from office: there are no taboos, everything should be discussed, Poland needs a President for the 21st century, the current incumbent is outdated, my son did not vote for him and would like to have his own, to date Poles have voted for candidate selected and groomed by the elite, and in the referendum they could be asked who their dream candidate would be (e.g. what sport he should play and whether he should respect the Constitution). This hardly seems a good direction for a modern state to take.

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